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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SUMMIT ENERGY CORPORATION, Plaintiff and Appellant, v. PAUL D. GLANVILLE et al., Defendants and Respondents.	2d Civil No. B148017 (Super. Ct. No. CIV192929) (Ventura County)

Plaintiff Summit Energy Corporation (Summit) appeals from a judgment entered against it following a court trial. Summit contends it presented sufficient proof to support its cause of action for trespass against defendants Paul D. Glanville, Consuelo Garcia and Delfino A. Garcia. We affirm.

FACTS AND PROCEDURAL HISTORY

Summit acquired a parcel of land in Fillmore and built a gas station and convenience store. The City required Summit to erect an eight-foot cement wall on the northern boundary of the property to minimize noise. A shorter wall already existed on the property line between the gas station and the adjacent lots owned by defendants. That wall had been built in the early 1970s, by previous owners of defendants' lots. Summit intended to build its new wall as close as possible to the existing wall.

When Summit's contractor dug a trench to build the new wall, he discovered that the footings from the defendants' existing wall extended 8-11 inches onto Summit's property. A representative of Summit spoke to defendant Glanville and told him the existing wall was over the property line.

A few days later, on October 11, 1999, Summit's legal counsel sent letters to all defendants notifying them of the encroachment and advising them that they had 24 hours to tear down the wall. A follow-up letter to defendants' counsel was sent on October 14, repeating the demand. Defendants' attorney wrote back on October 19, asking for documentation of Summit's claim. Summit's counsel forwarded a copy of a survey report, but this report did not show a subsurface encroachment.

Meanwhile, Summit's contractor continued to build the new cement block wall. The builders used the same trench they had originally dug, but the wall was located 12-18 inches away from the existing wall, leaving a larger space between the walls than was originally intended. The new wall was completed by the end of October 1999.

Summit filed a complaint for trespass, which sought an injunction and damages as to all defendants. The case was tried before the court on the issue of injunctive relief and liability, with the understanding that a jury would be impaneled, if necessary, on the issue of damages. Summit's counsel indicated that his client's claim was based solely on defendants' conduct after they were notified of the encroachment in October of 1999. Summit agreed that defendants had not caused the encroachment and were not previously aware of its existence.

The trial court ruled that there was no trespass and entered judgment in favor of defendants. It determined that there had been a subsurface encroachment onto Summit's property, but concluded that defendants did not act with the intent, recklessness or negligence necessary to impose liability.

DISCUSSION

Liability for Trespass

Summit contends the subsurface encroachment by defendants' wall footings was a trespass as a matter of law. It does not challenge the decision to deny injunctive relief, but argues that once the court determined there was an encroachment, it should have found liability and impaneled a jury to determine damages.

Trespass is the unauthorized entry onto the land of another, whether the entry is on, above, or below the surface of that land. (See *Martin Marietta Corp.* v. *Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132; *Cassinos* v. *Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1778.) Liability for a trespass that is not the product of ultrahazardous activity requires proof that the defendant's conduct was intentional, reckless or negligent. (*Armitage* v. *Decker* (1990) 218 Cal.App.3d 887, 906; *Gallin* v. *Poulou* (1956) 140 Cal.App.2d 638, 645.)

Before the trial commenced, Summit acknowledged there was no evidence that defendants had committed the initial encroachment. It disavowed any theory of liability based on the original installation of the subsurface footings or defendants' failure to discover the encroachment at an earlier date. The claim of trespass was expressly limited to defendants' failure to remove the fence *after* they were notified by Summit of the encroachment.

A trespass may be committed "by the continued presence on the land of a structure . . . which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." (Rest. 2d Torts, § 161(2), p. 289.) But a plaintiff proceeding under this theory of trespass still must prove that defendants' conduct was intentional, reckless or negligent. (See *Resolution Trust Corp.* v. *Rossmoor Corp*. (1995) 34 Cal.App.4th 93, 100.)

Substantial evidence supports the trial court's determination that defendants' conduct was not intentional. Defendants did not place the subsurface

footings on Summit's property, and the court could reasonably conclude that they did not intend for the footings to be "'at the place on the land where the trespass allegedly occurred.'" (See *Miller* v. *National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1480, quoting Prosser and Keeton on Torts (5th Ed. 1984) § 13, pp. 73-74.).)

Nor was the conduct reckless or negligent. Summit notified defendants of a possible encroachment, but did not provide defendants with a reasonable opportunity to investigate the claim and take appropriate action. Instead, Summit continued to build its own wall and completed it approximately two weeks later. Martin Zaldo, the Summit vice-president who supervised the construction of the gas station, testified that once the new wall was built, there was no reason for defendants to tear down the original wall.

Summit argues that its completion of the new wall did not eliminate the trespass, because the footings of the defendants' wall remain on its land. It is true that the *encroachment* is a continuing one. The issue before the trial court, however, was whether the circumstances of the encroachment subjected the defendants to tort liability.

The trial court correctly observed that if the wall footings constituted a trespass, the trespass was of a permanent nature. (See *Field-Escandon* v. *DeMann* (1988) 204 Cal.App.3d 228, 233-234.) Summit thus was entitled to bring one action to recover past and future damages. (*Id*. at p. 233.) It did so, but was unable to prove all the elements of that cause of action. The continuing nature of the encroachment does not entitle Summit to an award of damages, absent adequate proof that defendants acted intentionally, recklessly or negligently at the times relevant to this lawsuit.

Creation of an Easement

Summit argues that the trial court's ruling effectively granted defendants an easement in the area of the wall footings. It relies on *Hirshfield* v. *Schwartz* (2001) 91 Cal.App.4th 749, in which the defendants in a quiet title action were granted an equitable easement on the plaintiffs' property and were ordered to pay the fair market value of that easement. Summit contends that defendants similarly should have been

required to pay the fair market value of the land affected by their encroaching wall footings.

"When a trial court refuses to enjoin encroachments which trespass on another's land, 'the net effect is a judicially created easement by a sort of non-statutory eminent domain.'" (*Hirshfield* v. *Schwartz, supra*, 91 Cal.App.4th at p. 764.) In an appropriate case, the court may affirmatively fashion an equitable easement that will protect an encroacher's use of a neighbor's land, and may require payment for that use. (*Id*. at p. 765.)

Here, the trial court did not grant defendants an affirmative interest in Summit's land, and the parties did not argue the issue below. "'As a general rule an appellate court will consider only such points as were raised in the trial court, and this rule precludes a party from asserting, on appeal, claims to relief not asserted or asked for in the court below.'" (*Cinnamon Square Shopping Center* v. *Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1844.)

Summit also contends that the trial court's ruling should be reversed because it effectively grants defendants an exclusive prescriptive easement over Summit's property, in contravention of *Mehdizadeh* v. *Mincer* (1996) 46 Cal.App.4th 1296 and *Silacci* v. *Abramson* (1996) 45 Cal.App.4th 558. The issue of prescriptive easement was not litigated in the trial court and the court's ruling cannot be construed as a determination that such an easement exists. The issue is not properly before us.

Summit has suggested that the trial court's ruling allows defendants to maintain the encroachment on its land indefinitely without paying compensation. At oral argument, counsel for Summit informed this court that his client no longer has possession of the gas station property due to an unrelated unlawful detainer action. We express no opinion as to the respective rights of the defendants and subsequent possessors of the land previously occupied by Summit. But it does not appear that Summit will be injured by the continuing presence of the subsurface footings.

Finding of Encroachment

We do not reach defendants' argument that the court's finding of encroachment must be "reversed" because it was based on the testimony of an expert who was not properly designated by Summit. We also need not consider defendants' contention that Summit is estopped from claiming an encroachment due to the passage of time and the construction of the new wall. "As a general matter, 'a respondent who has not appealed from the judgment may not urge error on appeal.'" (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.)

The judgment is affirmed. Costs to respondent.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

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Kerry M. Kinney for Plaintiff and Appellant.

Clarizio, Goldfarb & Rosemblat, Archie Clarizioo and Raphael A. Rosemblat, for Defendants and Respondents.